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July 21, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
TW-A325-Lobby
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: **Ex Parte Presentation**, CC Docket No. 98-122, *Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri Under Section 253 of the Communications Act of 1934, as Amended*

Dear Ms. Salas:

On July 20, 2000, Christopher Heimann, Geoffrey Klineberg, and the undersigned, representing SBC Communications, Inc. (SBC), met with Kyle Dixon, Legal Advisor to Commissioner Powell, and Patrick Sullivan, Intern in the Office of Commissioner Powell. The purpose of the meeting was to discuss SBC's position in the Missouri preemption proceeding. The attached documents were discussed during the meeting.

Please contact me at (202) 326-8886 should you have any questions.

Sincerely,

cc: Kyle Dixon
Michelle Carey
Jake Jennings
Margaret Egler

Attachments

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OUTLINE FOR PRESENTATION ON MISSOURI PREEMPTION

(July 20, 2000)

I. Whether or Not it is Good Policy for States Themselves to Participate Through Their Municipally Owned Utilities as Competitors in the Telecommunications Market is a Question for States to Answer for Themselves.

- The policy decision is one for States to make based on their evaluation of their own circumstances and conditions.
- Congress left it up to the States whether or not to participate in the market through utilities controlled by their own political subdivisions in competition with private telecommunications providers.

II. Limiting a State's Authority, or Suggesting the Manner in Which States Should Allow Municipalities to Provide Telecommunications, would be Contrary to Long-Standing U.S. Communications Policy.

- The Commission itself instructed in its primer for foreign telecommunications regulators that “[a]n effective regulator should be independent from those it regulates. The defining feature of an independent regulatory body is that the regulator is separate from, and not accountable to, any provider of telecommunications services.”*

III. Based Upon an Evaluation of its own Circumstances, the State of Missouri Developed a Legislative Response. HB 620 Addresses the Real Conflict of Interest that a Municipality Faces When It Seeks Both to Regulate and to Compete With Private Telecommunications Providers.

- Prior to the passage of HB 620, cities throughout Missouri exercised their control over access to public rights-of-way and their right to gain access to sensitive information as a means to attain an unfair competitive advantage over private telecommunications providers. HB 620 was the Missouri Legislature's response to this conflict of interest.
- A municipality would have an indirect financial interest in, and therefore, not be fully independent of, even a structurally separate municipal utility because both are ultimately responsible to the same authority—residents of the municipality.

IV. HB 620 is a Limited, Reasonable Legislative Response to a Real Problem. (See Attachment)

- Instead of prohibiting political subdivisions of the State from providing any telecommunications service — as the Texas statute upheld by this Commission in the Texas Order had done — HB 620 permits municipalities to provide a range of telecommunications services that are arguably appropriate for a public agency.
- Moreover, the statute sunsets in 2 years (August 2002), requiring the Missouri General Assembly to reconsider its policy judgment at that time.
- In rejecting efforts to preempt the Texas statute, this Commission encouraged States to avoid imposing “absolute prohibitions on municipal entry into telecommunications” and urged instead the adoption of “measures that are much less restrictive than an outright ban on entry.” Texas Order, 13 FCC Rcd at 3549 [¶ 190] (emphasis added). Enacted one month prior to the release of the Texas Order, HB 620 would appear to be precisely what the Commission had in mind.

* FCC, *Connecting the Globe: A Regulator's Guide to Building Global Information Community* I-1 to I-2 (1999).

**MISSOURI'S PROHIBITION ON MUNICIPAL PROVISION OF
TELECOMMUNICATIONS SERVICES DOES NOT VIOLATE 47 U.S.C. § 253**

CC Docket No. 98-122
July 20, 2000

HB 620 — Mo. Rev. Stat. § 392.410(7) (1997) — provides as follows:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;
- (4) To students by an educational institution; or
- (5) Internet type services.

The provisions of this subsection shall expire on August 28, 2002.

47 U.S.C. § 253(a) provides as follows: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

- **THIS CASE IS CONTROLLED BY THE HOLDING OF CITY OF ABILENE.**
- **EFFORTS TO DISTINGUISH CITY OF ABILENE CANNOT SUCCEED.**
 - **A state's regulation of its municipally owned utilities implicates the sovereignty interests recognized in Gregory v. Ashcroft, 501 U.S. 452 (1991).**

Under Missouri Law, a municipally owned utility is indistinguishable from the municipality itself.

- **Nothing in the language of section 253(a) “compels” the conclusion that Congress intended to govern the relationship between states and municipally owned utilities.**

The text of section 253(a) contains no clear and unmistakable language.

Legislative history alone is insufficient to overcome Gregory's presumption.

In any case, the legislative history does not support preemption in this case.

- **HB 620 IS A LIMITED, REASONABLE LEGISLATIVE RESPONSE TO A PERCEIVED CONFLICT OF INTEREST.**